UNITED
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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 622

Case No. 659: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen, Vice-President; Mr. Ioan Voicu;

Whereas, on 2 March 1992, Amer Salih Araim, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

> "1. To find that the Administration failed to advertise the post of Secretary of the Special Committee against Apartheid as required by [General Assembly] resolution 33/143, part. 1, paragraph 1(a) of 20 December 1978 and therefore violated his right to be considered for that post.
>
> 2. To find that the Administration has failed to observe staff regulation 4.4 by not giving consideration to the candidacy of the Applicant for the vacant post and resorting instead to outside recruitment.
>
> 3. To find that the Office of Human Resources Management (OHRM) violated his rights by ignoring the report of the Panel on Discrimination and Other Grievances on his case, dated 1 July 1991, ...
>
> 4. To find that the Joint Appeals Board's Panel erred by refusing to take into account and to act upon the report of the Panel on Discrimination and Other Grievances.

5. To find that the Joint Appeals Board's Panel erred in law when it found that the outside recruitment of Mr. Tesfaye Tadesse constitutes a valid explanation [sic] of the Secretary-General's discretionary power.

...

8. To order the Secretary-General to immediately take action to end the discrimination to which the Applicant has been subjected due to his ethnic origin, to promptly advertise the post of Secretary of the Special Committee against Apartheid (no advertisement has yet been made, although the contract of the incumbent ends on 31 March 1992), and to give full and fair consideration for the candidature of the Applicant for this post.

9. To award the Applicant compensation equal to two years base salary for the injury sustained by him as a result of the on-going discrimination he has been subjected to, including the pre-determination to exclude his candidature to the post of Secretary of the Special Committee against Apartheid from consideration despite the Tribunal's Judgement No. 533, Araim."

Whereas the Respondent filed his answer on 20 March 1992;

Whereas the Applicant filed written observations on 8 and 26 May 1992;

Whereas, on 2 June 1992, the Respondent filed an additional statement;

Whereas, on 10 July and 4 December 1992, the Applicant submitted additional documents and on 18 December 1992, the Respondent submitted his comments thereon;

Whereas, on 12 January 1993, the Applicant submitted an additional statement and on 27 January 1993 the Respondent commented thereon;

Whereas, on 9 February and 18 and 28 May 1993, the Applicant submitted additional statements;

Whereas, on 4 June 1993, the Tribunal put questions to the Respondent and requested the production of a document;

Whereas, on 7 and 10 June 1993, the Respondent complied with the Tribunal's request;

Whereas, on 15 June 1993, the Tribunal put further questions to the Respondent, to which he provided answers on 21 June 1993;

Whereas, on 25 June 1993, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn consideration of the case;

Whereas, on 25 June and 8 July 1993, the Applicant submitted comments on the Respondent's submissions;

Whereas, on 24 August 1993, the Respondent submitted an additional statement and on 15 October 1993, the Applicant provided his comments thereon;

Whereas, on 19 October 1993, the Tribunal put further questions to the Respondent, to which he provided answers on 26 October and 3 November 1993;

Whereas, on 29 October and 5 November 1993, the Applicant submitted an additional statement.

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a fixed-term appointment for three years, as a Political Affairs Officer at the P-4 level, in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs. On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same department. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On

1 May 1989, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985. The Applicant has, since then, served as Secretary to various groups and committees, and as Deputy Secretary of the Special Committee against Apartheid.

In June 1991, the Secretary of the Special Committee against Apartheid died and the Applicant was appointed Acting Secretary. On 14 August 1991, the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), expressing an interest in the post he encumbered. He stated that, in view of his previous experience, the recommendations of the Joint Appeals Board (JAB) and of the Panel on Discrimination and Other Grievances (the Panel on Discrimination) in a prior case, he assumed his candidacy would be taken into account when the post of Secretary of the Special Committee Against Apartheid was to be filled. He further assumed that the post would be advertised soon.

In a memorandum dated 21 August 1991, the Assistant Secretary-General, Committee Against Apartheid (CAA), requested the Assistant Secretary-General, OHRM, to appoint Mr. Tesfaya Tadesse, former Permanent Representative of Ethiopia to the United Nations, temporarily, to the vacant post of Director, Office of the Assistant Secretary-General and as Secretary of the Special Committee against Apartheid, for seven months. He specified the post requirements, indicating that it involved "extensive consultations within and outside the United Nations and a profound understanding of developments both in South Africa and in the outside world". This "sensitive political role" required that the incumbent possess "highly developed diplomatic skills and judgement". He added: "I believe that given the possible changes that the upper echelons of the Secretariat would undergo by the end of February 1992 - changes that might affect also the head of the Centre - it is more appropriate at this stage to fill this post on a temporary basis and

allow myself or my successor to make a permanent appointment through the vacancy management process sometime early next year."

In a memorandum dated 3 September 1991, the Assistant Secretary-General, CAA, announced to all CAA staff, that the functions of the Director of the Office of the Assistant Secretary-General and Secretary of the Special Committee against Apartheid would be carried out by Mr. Tesfaya Tadesse, the former Permanent Representative of Ethiopia to the United Nations.

On 18 September 1991, the Applicant requested the Secretary-General to suspend the decision. Not having received a reply, the Applicant lodged an appeal with the JAB on 18 October 1991, requesting, under staff rule 111.2(f), to "injunct the Administration from filling this vacancy any more through temporary assignment until my appeal is decided".

On 31 October 1991, the Board adopted its report on the request for suspension of action. Its consideration and recommendations read as follows:

"Consideration and recommendations

14. The Panel noted that although the request for suspension of action met the conditions set forth in the Staff Rules and the JAB Rules of Procedure, since Mr. Tadesse's contract expires in April 1992, there was no urgency for immediate action. The Panel felt that the request for suspension of action is an integral part of the relief being sought by the Appellant in his appeal, and it would be useful to consider it in that context. Moreover, the Panel was aware of the Appellant's concern that the Administration might create new circumstances regarding the post in question while the JAB was considering his appeal.

15. The Panel expects that the Panel considering the substance appeal will do so speedily and will certainly conclude before 28 February 1992. Based on this and on the statements of the parties, the Panel recommends that any action to fill the post in question be suspended until 28 February 1992 or until

the Panel submits its recommendation on the substance of the appeal, if earlier. This in no way, however, precludes following the normal procedures for advertising the vacancy."

In a letter dated 7 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant as follows:

"The Secretary-General has examined your request for suspension of action in the light of the Board's report. The decision to fill the post temporarily through the appointment of Mr. Tadesse became effective on 3 September 1991. Such decision cannot therefore be stayed. The Secretary-General has decided therefore that your request cannot be accepted."

On 29 January 1992, the Board adopted its report on the merits of the case. Its considerations and recommendations read as follows:

"Consideration and recommendations

15. The Panel noted that the decision of the Secretary-General to fill temporarily the post of Director of the office of the Assistant Secretary-General, and Secretary of the Special Committee without announcing the above mentioned vacancy, was taken within his discretionary power.

16. The Panel understands the Appellant's concern that by appointing another person temporarily to the post in question, the Administration is denying the Appellant the chance to be fairly and seriously considered for the vacant post. However, the Panel noted that the Appellant did not bring sufficient evidence nor did he reveal any facts indicating that the Secretary-General's decision to fill the post in question with an external candidate was made in bad faith or was motivated by prejudice or any other extraneous factors.

17. On the other hand, the Panel took note of the Respondent's statement concerning appointment of the external candidate i.e. 'As an interim solution until such selection could be made, an external candidate was placed against the subject post on a seven-month

contract ... a request for confirmation of the level of the post with a view to issuing a vacancy announcement was submitted by the Department to Classification, OHRM, as early as 12 July 1991.'

18. On the basis of the Respondent's reply, the Panel is expecting that the post in question will be advertised as soon as possible, so that suitable candidates will be able to apply for consideration when the seven-month contract of the external candidate expires. The Panel is of the opinion that the selection of a candidate to the post in question should be made in accordance with the procedure set forth in administrative instruction ST/AI/373 of 23 December 1991.

19. The Panel trusts that when the vacancy announcement is issued, the Appellant will receive the full and fair consideration to which he is entitled and that the Administration will act in a fair manner regarding the vacancy circulation announcement and the selection process.

20. In view of the aforesaid, the Panel unanimously decides to make no further recommendation in support of this appeal."

On 3 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined the case in the light of the JAB report and had decided to maintain his decision. He added: "[The Secretary-General] wishes to confirm that you should be considered, in accordance with staff rule 104.14(f)(iii) and the relevant provisions of administrative instruction ST/AI/373, for current and foreseeable vacancies in your department, including the vacancy which will arise in respect of the post which was the subject of your appeal."

On 2 March 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The post of Secretary of the Special Committee against Apartheid was not advertised in accordance with the former Vacancy Management System.

2. The Applicant was not fairly considered for the post.

3. The decision not to promote the Applicant is a further example of discrimination by the then Assistant Secretary-General, CAA, who, since his arrival in 1987, discriminated against him.

Whereas the Respondent's principal contention is:

The former Secretary-General had discretion to decide that it was in the interest of the Organization to appoint a qualified individual to a senior post on a temporary basis, pending changes in the Secretariat, expected to be introduced by the incoming Secretary-General.

The Tribunal, having deliberated in Geneva from 3 to 24 June 1993 and in New York from 19 October to 12 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Respondent dated 3 February 1992, based on a Joint Appeals Board (JAB) report dated 29 January 1992, which considered the Respondent's action in filling temporarily the then combined post of Director of the Office of the Assistant Secretary-General in the Centre Against Apartheid (CAA) and Secretary of the Special Committee Against Apartheid, Department of Political and Security Council Affairs. The Applicant challenges that decision because the appointment was made without announcing the vacancy. The Applicant further claims that he was unfairly and discriminatorily treated by not being fairly and seriously considered for the post. Those are the only two issues before the Tribunal. Other matters raised by the Applicant, such as an allegedly wrongful downgrading of a post, which were not considered by the JAB, are not properly before the Tribunal.

II. When the JAB report was adopted, it was anticipated, based on submissions on behalf of the Respondent, that the post in question would be advertised within a few months. With that in mind, the JAB was of the opinion that the selection of a candidate for the post should be made in accordance with the procedure set forth in administrative instruction ST/AI/373, dated 23 December 1991, and that the Applicant should receive full and fair consideration for the post.

III. Shortly thereafter, however, the situation envisaged by the JAB changed. In response to a question put by the Tribunal relating to the issue of alleged discrimination, the Tribunal was informed by the Respondent that, as a result of reorganization and restructuring of the Secretariat, the content of the post in question, which had previously been at the D-1 level, was revised. The CAA was placed under the Department of Political Affairs and the former Assistant Secretary-General who had been in charge of it was replaced by a person at the D-2 level, with responsibilities additional to those previously assigned to the Assistant Secretary-General. The CAA is now part of a unit, headed by a D-2 staff member and is entitled "Programmes Against Apartheid and for Political Rights". The Special Committee Against Apartheid is now within the Committee Services and Research Branch of the Centre and is headed by a D-1 level staff member. It is serviced by a Secretary, currently the Applicant, at the P-5 level. The post sought by the Applicant thus appears not to be the same as the post considered in the JAB report. The combined D-1 level post that had previously been part of the Assistant Secretary-General's office was set aside for future use by the office of the Under-Secretary-General. The Applicant has, however, raised questions as to whether, in fact, the temporary incumbent of the post was required to perform or performed both functions.

IV. The JAB found that the Respondent's decision to fill temporarily the post that previously existed, without a prior

vacancy announcement, was within his discretionary authority. It also found that the evidence was insufficient to establish that the Respondent's decision to fill that post with an external candidate was made in bad faith or was motivated by prejudice or any other extraneous factors. Although the JAB's report and the Respondent's decision were overtaken by events, the Applicant's claim of unlawful treatment and discrimination in connection with the temporary external filling of the post, must be considered by the Tribunal.

V. The post in question became vacant by reason of the death of the incumbenet in June 1991. His Committee responsibilities were carried out by the Applicant, who served as Acting Secretary of the Special Committee. On 14 August 1991, the Applicant called to the attention of the Assistant Secretary-General, OHRM, that he had been acting in this capacity and asked that earlier recommendations that he be fairly considered for promotion to the D-1 level, be taken into account when filling the post of Secretary of the Special Committee. The Applicant anticipated that the post would soon be advertised under the Vacancy Management System. On 21 August 1991, the Assistant Secretary-General of the CAA, communicated with the Assistant Secretary-General, OHRM, regarding the combined post which had become vacant. With the endorsement of the Under-Secretary-General in charge of the Department, he informed the Assistant Secretary-General, OHRM, that the post involved extensive consultations within and outside the UN and required a profound understanding of developments, both in South Africa and in the rest of the world. He felt that the sensitive political role of the post required that the incumbent should possess highly developed diplomatic skills and judgement. He stated his belief that a possible change in the upper echelons of the Secretariat by February 1992, might also affect the post he occupied as head of the CAA. It was therefore more appropriate to fill the post on a temporary basis and allow whoever might eventually be the head of the CAA, to decide on a permanent appointment early in 1992. It may be noted, parenthetically, that the "possible change" materialized, as set

forth in paragraph III above and a significant reorganization occurred which affected the post in question. The Assistant Secretary-General requested a seven-month temporary appointment of an external candidate who had formerly been the Permanent Representative of Ethiopia to the United Nations. This proposal, having apparently been approved by the Under-Secretary-General in charge of the Department, was implemented and the external candidate assumed the post in September 1991. His initial temporary appointment was extended by short-term monthly contracts until 31 July 1992. He served for approximately eleven months, though the D-1 post was redeployed after the restructuring described in paragraph III above took place.

VI. The Tribunal has held that all vacancies are to be advertised, although the Secretary-General has the authority to indicate in the advertisement how he would fill the vacancy. Moreover, the lack of advertisement in a given case would be irrelevant, if it were established that an applicant was in fact given adequate consideration. Cf. Judgement No. 447, Abbas (1989), paragraph VII. Of course, situations may arise in which it is simply not feasible to advertise a vacancy because of an urgent need to fill a post temporarily. In such cases where: (1) there is a reasonable explanation justifying the temporary action, and (2) the initiation and duration of temporary measures are not unduly prolonged before the proper procedures are undertaken, it is plainly within the Respondent's authority as Chief Administrative Officer to meet the needs of the Organization in that fashion. But this does not mean that the rights of the staff to be fairly considered for vacancies through advertising procedures can be ignored merely on the basis of insubstantial excuses. The principle of fair treatment of the staff calls for reasonable efforts to avert the need for temporary external appointments which adversely affect staff opportunities for advancement. When such appointments are necessary, they should be limited to the shortest possible duration.

VII. In this case, some explanation, as described above, was forthcoming. However, the Tribunal fails to see why, given the considerations described by the Assistant Secretary-General, CAA, it took from June 1991, when the incumbent of the post died, until the latter part of August, for the Assistant Secretary-General, CAA, to decide, without advertising, that the post had to be filled hurriedly by an external candidate. The was ample time to see whether a suitable internal candidate might be found - even on a temporary basis, subject to the uncertainties of a possible reorganization. Furthermore, during the eleven months after the temporary appointment to the post, an effort could have been made toward replacing the external appointee with a suitable internal candidate - again on a similar temporary basis, if necessary. There is no indication that the external candidate's qualifications were ever evaluated on a comparative basis with anyone else's, thus undermining the protection intended for the staff by the requirement that vacancies be advertised. The sequence and timing of the events in this case lead the Tribunal to conclude that the temporary appointment of the external candidate was prearranged, without any proper consideration having being given to advertising the post. This necessarily foreclosed any meaningful consideration of internal candidates who might have had qualifications equal or superior to those of any external candidate.

VIII. Had the vacancy been advertised as a temporary post, subject to the uncertainties associated with a possible reorganization, it is by no means clear to the Tribunal that the Applicant would have been selected if he had applied. The Assistant Secretary-General, CAA, apparently did not think highly of the Applicant's qualifications, despite performance evaluations which did not make this clear. In post hoc submissions, the Assistant Secretary-General, CAA, explained his views. However, in the context of the issue before the Tribunal, such after-the-fact explanations do not overcome the infringement of the Applicant's rights by the unjustified procedure in this case, which deprived him (as well as

other potential applicants), of the opportunity to be considered on the basis of comparative qualifications for the post. In short, neither the Applicant nor anyone other than the external candidate, was given any, much less adequate, consideration, and the Applicant was injured by that irregularity. For that injury, he is entitled to compensation.

IX. With respect to the Applicant's claim that his non-selection for temporary assignment to the post was motivated by discrimination against him on account of his national origin or ethnic background, the Tribunal concurs with the conclusion reached by the JAB that the Respondent's decision to fill the post temporarily with an external candidate was not motivated by prejudice against the Applicant based on national origin or ethnic background. The Tribunal has taken into account the report and recommendations of the Panel on Discrimination and Other Grievances (the Panel on Discrimination), as well as the Administration's position with regard thereto. The latter is set forth in communications to the Panel on Discrimination and to the Under-Secretary-General for Administration and Management in an ad hoc report. This report addresses the Panel on Discrimination's findings and recommendations and the various claims asserted by the Applicant. The Tribunal does not view the ad hoc report as the equivalent of a report by the Panel on Discrimination. Rather, in the context of this case, the Tribunal has considered it only as a response to the assertions by the Applicant of discriminatory treatment, and as an explanation for the Administration's unwillingness to adopt the recommendations made by the Panel on Discrimination. In the Tribunal's view, the latter recommendations rest mainly on subjective impressions and unsubstantiated inferences based on material of little probative value. In the circumstances of this case, the Tribunal, like the JAB, is unable to find that the Applicant was the victim of discrimination based on ethnic or national origin.

4. For the foregoing reasons and as set forth in paragraph VIII, the Tribunal orders that:

(a) the Respondent pay US$2,000, as compensation to the Applicant for the injury sustained by him; and that

(b) all other claims be, and they are, rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Ioan VOICU
Member

New York, 12 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary